

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

HEATHER E. BRIGGS,  
Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,  
Defendant.

No. CV-07-0278-CI

ORDER GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 18, 25). Attorney Lana Cece Glenn represents Plaintiff; Special Assistant United States Attorney Terrye Erin Shea represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment. (Ct. Rec. 25.) Plaintiff's Motion for Summary Judgment (Ct. Rec. 18) is **DENIED**.

**JURISDICTION**

On March 30, 2001, Plaintiff Heather Briggs (Plaintiff) protectively filed for Supplemental Security Income. (Tr. 164-170.) Upon initial application, Plaintiff alleged disability due to problems with vision, back pain, and depression, with an alleged onset date of August 1, 1997. (Tr. 164, 167.) Benefits were denied initially and

1 on reconsideration. (Tr. 128-131, 134-136.) Plaintiff requested a  
2 hearing before an administrative law judge (ALJ), and hearings were  
3 held on September 19, 2002 and March 20, 2003. (Tr. 41-97, 100-125.)  
4 After Plaintiff appealed an unfavorable decision, the case was  
5 remanded pursuant to an order by the United States District Court for  
6 the Eastern District of Washington. (Tr. 554-555.) At a hearing on  
7 June 7, 2006, Plaintiff, who was present and represented by counsel,  
8 psychological expert R. Thomas McKnight, Ph.D., and vocational expert  
9 Daniel R. McKinney, testified. (Tr. 783-855.) ALJ Mary Reed denied  
10 benefits and the Appeals Council denied review. (Tr. 501-504, 533.)  
11 The instant matter is before this court pursuant to 42 U.S.C. §  
12 405(g).

#### 13 **STATEMENT OF THE CASE**

14 The facts of the case are set forth in detail in the transcript  
15 of proceedings, and are briefly summarized here. Plaintiff was 19  
16 years old at the time of filing, 28 at the relevant hearing, and had  
17 a high-school education. (Tr. 532, 815-816.) She testified she had  
18 past work experience assisting in a veterinary clinic, filing in an  
19 office, and working as an aide in a retirement home. (Tr. 59-60,  
20 817.) Since Plaintiff suffered a back injury several years earlier,  
21 prolonged sitting or standing cause pain in her neck and shoulders and  
22 limited range of motion. (Tr. 819.) She lives with her partner, and  
23 her two children, aged 13-months and eight years. (Tr. 826, 829.)  
24 Plaintiff testified she experiences headaches, dizziness, problems  
25 with grasping, tingling, asthma, pain her right knee, arm and wrist,  
26 and insomnia. (Tr. 822-825, 828-830.) She stated she becomes tearful  
27 daily or every other day. (Tr. 831.) She watches television and  
28 plays with her children. (Tr. 831.)

**ADMINISTRATIVE DECISION**

The ALJ incorporated her prior decision by reference. (Tr. 521, 523, referring to Tr. 17-33.) At step one of the sequential evaluation, the ALJ found Plaintiff had not engaged in substantial gainful activity since the alleged onset date of August 1, 1997. (Tr. 523.) (Although Plaintiff worked, it did not rise to level of substantial gainful activity. Tr. 18.) At steps two and three, ALJ Reed found Plaintiff had the severe impairments of asthma and personality and depressive disorders (Tr. 523), but these impairments alone or in combination did not meet or equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 524.) The ALJ found Plaintiff's statements "not entirely credible." (Tr. 526.)

At steps four and five, the ALJ determined Plaintiff has no past relevant work, but other jobs exist that a person with Plaintiff's limitations could perform. (Tr. 532-533.) Based on vocational expert testimony, she found Plaintiff was capable of performing work as a hand packer, assembler, and product checker. (Tr. 533.) Therefore, Plaintiff was not found "disabled" as defined in the Social Security Act at any time through the date of the ALJ decision. (Tr. 533.)

**STANDARD OF REVIEW**

In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the court set out the standard of review:

A district court's order upholding the Commissioner's denial of benefits is reviewed *de novo*. *Harman v. Apfel*, 211 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2000). The decision of the Commissioner may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence

1 as a reasonable mind might accept as adequate to support a  
 2 conclusion. *Richardson v. Perales*, 402 U.S. 389, 401  
 3 (1971). If the evidence is susceptible to more than one  
 4 rational interpretation, the court may not substitute its  
 judgment for that of the Commissioner. *Tackett*, 180 F.3d at  
 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d  
 595, 599 (9th Cir. 1999).

5 The ALJ is responsible for determining credibility,  
 6 resolving conflicts in medical testimony, and resolving  
 7 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
 8 Cir. 1995). The ALJ's determinations of law are reviewed *de*  
*novo*, although deference is owed to a reasonable  
 construction of the applicable statutes. *McNatt v. Apfel*,  
 201 F.3d 1084, 1087 (9th Cir. 2000).

### 9 SEQUENTIAL PROCESS

10 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 11 requirements necessary to establish disability:

12 Under the Social Security Act, individuals who are  
 13 "under a disability" are eligible to receive benefits. 42  
 14 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 15 medically determinable physical or mental impairment" which  
 16 prevents one from engaging "in any substantial gainful  
 17 activity" and is expected to result in death or last "for a  
 18 continuous period of not less than 12 months." 42 U.S.C. §  
 19 423(d)(1)(A). Such an impairment must result from  
 20 "anatomical, physiological, or psychological abnormalities  
 21 which are demonstrable by medically acceptable clinical and  
 laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3).  
 The Act also provides that a claimant will be eligible for  
 benefits only if his impairments "are of such severity that  
 he is not only unable to do his previous work but cannot,  
 considering his age, education and work experience, engage  
 in any other kind of substantial gainful work which exists  
 in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A).  
 Thus, the definition of disability consists of both medical  
 and vocational components.

22 In evaluating whether a claimant suffers from a  
 23 disability, an ALJ must apply a five-step sequential inquiry  
 24 addressing both components of the definition, until a  
 25 question is answered affirmatively or negatively in such a  
 26 way that an ultimate determination can be made. 20 C.F.R. §§  
 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the  
 27 burden of proving that [s]he is disabled." *Meanel v. Apfel*,  
 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the  
 28 presentation of "complete and detailed objective medical  
 reports of h[is] condition from licensed medical  
 professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b),  
 404.1513(d)).

1 It is the role of the trier of fact, not this court, to resolve  
2 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
3 supports more than one rational interpretation, the court may not  
4 substitute its judgment for that of the Commissioner. *Tackett*, 180  
5 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
6 If there is substantial evidence to support the administrative  
7 findings, or if there is conflicting evidence that will support a  
8 finding of either disability or non-disability, the finding of the  
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
10 1230 (9<sup>th</sup> Cir. 1987). Nevertheless, a decision supported by  
11 substantial evidence will still be set aside if the proper legal  
12 standards were not applied in weighing the evidence and making the  
13 decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d  
14 432, 433 (9<sup>th</sup> Cir. 1988).

#### 15 ISSUES

16 The question is whether the ALJ's decision is supported by  
17 substantial evidence and free of legal error. Specifically, Plaintiff  
18 argues the ALJ erred in her evaluation of the medical evidence,  
19 credibility and RFC determinations, and failure to follow the court's  
20 remand order. (Ct. Rec. 19 at 41-43, 44-73.) The Commissioner  
21 responds that the decision should be affirmed because it is free of  
22 legal error and supported by substantial evidence. (Ct. Rec. 26 at  
23 32).

#### 24 DISCUSSION

##### 25 A. Weighing medical evidence

26 Plaintiff alleges the ALJ erred in assessing the medical  
27 evidence, apparently by failing to find her spinal impairment, knee  
28 impairment, and headaches severe at step two, failing to find her

1 impairments met or medically equaled a Listing impairment at step  
2 three, and in assessing her RFC.

3 Physical Impairments

4 In social security proceedings, the claimant must prove the  
5 existence of a physical or mental impairment by providing medical  
6 evidence consisting of signs, symptoms, and laboratory findings; the  
7 claimant's own statement of symptoms alone will not suffice. 20  
8 C.F.R. § 416.908. The effects of all symptoms must be evaluated on  
9 the basis of a medically determinable impairment which can be shown to  
10 be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical  
11 evidence of an underlying impairment has been shown, medical findings  
12 are not required to support the alleged severity of symptoms. *Bunnell*  
13 *v. Sullivan*, 947, F.2d 341, 345 (9<sup>th</sup> Cr. 1991).

14 A treating or examining physician's opinion is given more weight  
15 than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d  
16 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's  
17 opinions are not contradicted, they can be rejected only with clear  
18 and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir.  
19 1995). If contradicted, the ALJ may reject an opinion if he states  
20 specific, legitimate reasons that are supported by substantial  
21 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d  
22 1453, 1463 (9<sup>th</sup> Cir. 1995). In addition to medical reports in the  
23 record, the analysis and opinion of a non-examining medical expert  
24 selected by an ALJ may be helpful to the adjudication. *Andrews v.*  
25 *Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995) (*citing Magallanes v.*  
26 *Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)). Testimony of a medical  
27 expert may serve as substantial evidence when supported by other  
28 evidence in the record. *Id.*

1 An impairment or combination of impairments may be found "not  
2 severe *only if* the evidence establishes a slight abnormality that has  
3 no more than a minimal effect on an individual's ability to work."  
4 *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9<sup>th</sup> Cir. 2005) (citing *Smolen*  
5 *v. Chater*, 80 F.3d 1273, 1290 (9<sup>th</sup> Cir. 1996); see *Yuckert v. Bowen*,  
6 841 F.2d 303, 306 (9<sup>th</sup> Cir. 1988). If an adjudicator is unable to  
7 determine clearly the effect of an impairment or combination of  
8 impairments on the individual's ability to do basic work activities,  
9 the sequential evaluation should not end with the not severe  
10 evaluation step. S.S.R. No. 85-28 (1985). Step two, then, is "a de  
11 minimus screening device [used] to dispose of groundless claims,"  
12 *Smolen*, 80 F.3d at 1290, and an ALJ may find that a claimant lacks a  
13 medically severe impairment or combination of impairments only when  
14 his conclusion is "clearly established by medical evidence." S.S.R.  
15 85-28. The question on review is whether the ALJ had substantial  
16 evidence to find that the medical evidence clearly established that  
17 the claimant did not have a medically severe impairment or combination  
18 of impairments. *Webb*, 433 F.3d at 687; see also *Yuckert*, 841 F.2d at  
19 306.

20 With respect to physical limitations, Plaintiff contends that the  
21 ALJ erred by failing to give legitimate reasons for rejecting the  
22 opinions of treating physicians G. W. Bagby, M.D., Frank Cruz, M.D.,  
23 James Perry, M.D., John Rodgers, M.D., Richard Gascoigne, Jr., M.D.,  
24 and physical therapist Joel Armstrong. (Ct. Rec. 19 at 43-56.)

25 The ALJ found Plaintiff's sole severe physical impairment meeting  
26 the 12-month durational requirement is asthma, an ailment controlled  
27 with medication. The record reveals that in the year following onset  
28 (March 15, 2001), Plaintiff saw medical treatment providers at North

1 Basin Health Services numerous times. The ALJ is correct that the  
2 only chronic condition treated then and later was asthma. See, e.g.,  
3 6/12/01 (right knee pain, Tr. 397); 6/27/01 (upper respiratory  
4 infection, Tr. 397); 7/16/01 (**asthma** follow up, Tr. 398); 8/2/2001  
5 (sinusitis and bronchitis, Tr. 399); 8/7/2001 (rhinitis, Tr. 399);  
6 9/18/2001 (eczema of the feet, Tr. 400); 9/28/2001 (sinusitis, early  
7 bronchitis, Tr. 400); 10/21/2001 (**asthma**, sinusitis, bronchitis, Tr.  
8 400); 1/7/2002 (**asthma**, occasional dizziness and chest pain, insomnia,  
9 Tr. 401); 1/11/2002 (**asthma**, heartburn, Tr. 401); 2/12/2002  
10 (heartburn, **asthma**, bronchitis, Tr. 402); 3/9/2002 (conjunctivitis,  
11 bronchitis, upper respiratory infection, Tr. 403). On November 15,  
12 2002, Plaintiff told Dr. Bostwick she sees Dr. Cruz for asthma follow  
13 up as needed. (Tr. 430.) When Dr. Bostwick asked her if she had any  
14 conditions other than depression preventing her from working Plaintiff  
15 said, "[t]hat was it." (Tr. 431.) The medical record supports the  
16 ALJ's determination that Plaintiff's treatment providers saw her for  
17 non-severe, transient conditions; asthma is the only arguably severe  
18 physical impairment supported by the medical record.

19 When weighing the conflicting medical evidence, the ALJ also  
20 considered Plaintiff's credibility, and found her less than completely  
21 credible. (Tr. 526-527.) Credibility determinations bear on the  
22 evaluation of medical evidence when an ALJ is presented with  
23 conflicting medical opinions. *Webb v. Barnhart*, 433 F.3d 683, 688 (9<sup>th</sup>  
24 Cir. 2005). In *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir.  
25 2002), the court held when an ALJ finds the claimant's testimony as to  
26 the severity of pain and impairments is unreliable, the ALJ must make  
27 a credibility determination with findings sufficiently specific to  
28 permit the court to conclude the ALJ did not arbitrarily discredit



1 claimant's testimony. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46 (9<sup>th</sup>  
2 Cir. 1991) (en banc).

3 While the ALJ cannot disregard a claimant's subjective complaints  
4 regarding the severity of his or her symptoms solely because there is  
5 a lack of objective medical evidence to support the testimony, there  
6 must be some objective medical evidence of an impairment for the time  
7 at issue. However, the lack of objective medical evidence is just one  
8 factor considered by the Commissioner. *Id.* at 345. The following  
9 factors may be considered: (1) the claimant's reputation for  
10 truthfulness; (2) inconsistencies in the claimant's testimony or  
11 between his testimony and his conduct; (3) claimant's daily living  
12 activities; (4) claimant's work record; and (5) testimony from  
13 physicians or third parties concerning the nature, severity, and  
14 effect of claimant's condition. *Thomas*, 278 F.3d at 958.

15 Once there is evidence of a medically determinable impairment  
16 likely to cause an alleged symptom, the ALJ must provide specific and  
17 cogent reasons for rejecting a claimant's subjective complaints.  
18 *Bunnell*, 947 F.2d at 346. In the absence of affirmative evidence of  
19 malingering, the ALJ's reasons must be "clear and convincing."  
20 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1038-39 (9<sup>th</sup> Cir. 2007);  
21 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9<sup>th</sup> Cir. 2001); *Morgan*, 169  
22 F.3d at 599. The ALJ "must specifically identify the testimony she or  
23 he finds not to be credible and must explain what evidence undermines  
24 the testimony." *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9<sup>th</sup> Cir.  
25 2001)(citation omitted).

26 There is no clear evidence of malingering, thus the adjudicator's  
27 credibility determination must be supported by "clear and convincing"  
28 reasons. ALJ Reed gave several reasons for finding Plaintiff less

1 than completely credible, and for her assessment of the medical  
2 evidence:

3       After considering the evidence of record, the  
4       undersigned finds that the claimant's medically determinable  
5       impairments could reasonably be expected to produce the  
6       alleged symptoms,<sup>[1]</sup> but that the claimant's statements  
7       concerning the intensity, persistence and limiting effects  
8       of these symptoms are not entirely credible.

9       . . . .

10       . . . . The undersigned finds that the claimant's  
11       statements are not credible. Many of the claimant's  
12       allegations are not consistent with the medical record nor  
13       is there a medically determinable impairment which would  
14       provide a basis for the symptoms. The claimant testified  
15       that she sometimes blacks out, but there is no medically  
16       determinable impairment to support this claim and in her  
17       medical records there was only one reference to dizziness in  
18       June 2006, but with no objective findings. Exhibit 40F. She  
19       complained of tingling and numbness in her hands, but her  
20       neurological exams were normal and x-rays were negative and  
21       she specifically denied tingling or weakness in her arms in  
22       May 2006. Exhibit 40F/19,/20 and /26. Also see scans  
23       indicating no abnormalities in Exhibit 38F. Also see other  
24       references in Exhibit 40F indicating normal gait, strength  
25       and reflexes. In Exhibit 40F/7 she denied any neurological  
26       deficits. In May 2001 there was a reference to knee pain  
27       and she had a short round of physical therapy where she did  
28       well and met her treatment goals. Exhibit 36F. More recent  
29       records do not reflect this as an ongoing complaint and she  
30       has been reported to have normal gait and strength. Exhibit  
31       40F. No inflammation has been noted with respect to her  
32       knees. Exhibit 40F/10.

33       . . . .

34       . . . . The claimant said she is depressed and cries a  
35       lot, sometimes daily, but there is no evidence of this in  
36       the current medical records. The fact that claimant alleges  
37       impairments that she didn't find significant enough to  
38       report to her doctors, makes it difficult to accept her  
39       assertions that these conditions are disabling. The  
40       claimant has also described daily activities which are not

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41       <sup>1</sup> Given the ALJ's step two analysis, it is clear that she refers  
42       to asthma, and depressive and personality disorders, as the  
43       determinable impairments which are expected to produce symptoms, but  
44       not to the extent Plaintiff has described.

1 limited to the extent one would expect, given the complaints  
2 of disabling symptoms and limitations. . . . the claimant  
3 has reported that she takes care of her [13-month old]  
4 child, she feeds him, bathes him, changes his diapers, picks  
5 up clothes, plays with him in the yard, carries the laundry,  
6 and sweeps and mops. Moreover, the record includes evidence  
7 strongly suggesting that the claimant has exaggerated  
8 symptoms and limitations. Exhibit 10F.

9 (Tr. 526-527.) With respect to activities, the ALJ's incorporated  
10 prior decision notes Plaintiff's ability in February and March of 2001  
11 to complete an eight-to-nine week Project Self-Sufficiency program at  
12 a community college. (Tr. 23, 26, 53.) The program lasted eight  
13 hours a day, five days a week. (Tr. 23.)

14 The ALJ appropriately relied on evidence of symptom exaggeration  
15 when she weighed credibility, citing Exhibit 10F, Plaintiff's April  
16 25, 2001, MMPI-2 profile:

17 This individual appears to operate with poor psychological  
18 efficiency because of a very strong concern for her health,  
19 evidenced by many diverse physical complaints. Her symptoms  
20 are vague and are not likely to be fully explained by actual  
21 organic causes. She may react to stress by whining and  
22 complaining about her health, and she seems generally  
23 unhappy and pessimistic about life. She may be obtaining  
24 secondary gain through the attention or services she  
25 receives for the complaints.

26 (Exhibit 10F at Tr. 332, Mark Mays, Ph.D.)

27 The ALJ's reliance on Plaintiff's inconsistent statements is also  
28 convincing and supported by the record. Plaintiff has indicated she  
29 has eight half siblings; at other times, fourteen. (Tr. 24, referring  
30 to Tr. 433 and Tr. 271.) Plaintiff testified she quit working at the  
31 office and veterinary clinics because "some of the people had serious  
32 - it seemed like attitudes towards me." (First hearing, September 19,  
33 2002 at Tr. 60-61.) The ALJ notes that elsewhere, Plaintiff reported  
34 leaving the veterinary clinic (1) voluntarily due to pregnancy; (2)  
35 voluntarily due to training hours ending; and (3) involuntarily as she

1 was laid off due to absences secondary to back pain while pregnant.  
2 (Tr. 19, 26 referring to Exhibits 2F at Tr. 175, 6F, 26F).

3 As noted, when presented with conflicting medical opinions, the  
4 ALJ must determine credibility and resolve the conflict. *Matney v.*  
5 *Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992). The ALJ's reasons for  
6 finding Plaintiff less than fully credible are clear and convincing.  
7 The inconsistencies in Plaintiff's statements, the inconsistencies  
8 between her statements and her conduct, and the extent of Plaintiff's  
9 daily activities all fully support the ALJ's finding. See *Thomas v.*  
10 *Barnhart*, 278 F.3d at 958-959 (9<sup>th</sup> Cir. 2002), citing *Light v. Social*  
11 *Security Administration*, 119 F.3d 789, 792 (9<sup>th</sup> Cir. 1997).

12 The ALJ rejected Dr. Bagby's 1998 opinion because it predated  
13 onset by about three years, and he opined Plaintiff could work at the  
14 light level for six months (in part due to post partum status),  
15 thereby, even if credited, failing to meet the Act's 12-month  
16 durational requirement. See 42 U.S.C. § 1382c(a)(3)(A). (Tr. 527,  
17 referring to Tr. 218-222.) Both are specific and legitimate reasons  
18 supported the record.

19 The ALJ found Plaintiff treated intermittently for complaints of  
20 knee, neck, and back pain, and concluded that none of Plaintiff's  
21 physical complaints, except asthma, met the 12-month durational  
22 requirement. (Tr. 526.)

23 The ALJ rejected treating doctors's opinions based on Plaintiff's  
24 unreliable self-reports. The ALJ notes with respect to headaches, Dr.  
25 Gascoigne appears to base his assessment on Plaintiff's unreliable  
26 self-reported symptoms. For example, he notes on March 31, 2004: "She  
27 has had a migraine constantly for several weeks." (Tr. 749; see also  
28 Tr. 743, 748, headache assessed based on self-report.) Two months

1 later, after a trial of medication, Dr. Gascoigne's notes show no  
2 headache complaint. (Tr. 750.) Other medical records indicate that  
3 Dr. Gascoigne treated Plaintiff for non-severe impairments such as  
4 cough and upper respiratory infection. (Tr. 465, 754.) The ALJ noted  
5 that at times Plaintiff's headaches have been ascribed to a rebound  
6 reaction to non-prescription pain medication. (Tr. 527, referring to  
7 Exhibit 40F at Tr. 758.)

8 The ALJ rejected the opinions of treating doctors which were not  
9 supported by medical evidence consisting of signs, symptoms and  
10 laboratory findings. (Tr. 526.) The ALJ points out that Plaintiff's  
11 neurological and musculoskeletal exams were normal during the relevant  
12 time frame. (Tr. 527, referring to Exhibit 40F/6, /7 and /10; 40F/19.)

13 Treating physician James Perry, M.D., diagnosed right patellar  
14 subluxation at the date of onset and planned to treat it exclusively  
15 with physical therapy. He opined no imaging, injections or surgery  
16 was warranted. (Tr. 310-311.) Plaintiff attended physical therapy  
17 sporadically, as noted by the ALJ, despite complaints of disabling  
18 pain: for one month in 2001 (knee pain), and two appointments in  
19 September of 2002 (back and neck pain). (Tr. 527, referring to  
20 Exhibits 8F, 15F, 25F, 31F/4, 36F, 38F, and 40F/19-20.) The amount of  
21 treatment is "an important indicator of the intensity and persistence  
22 of [Plaintiff's] symptoms," C.F.R. § 416.929 (c)(3). With respect to  
23 physical therapist Joel Armstrong, the ALJ correctly observes that he  
24 did not offer an opinion of Plaintiff's physical capacity, opined she  
25 met all treatment goals after a month of therapy (March 19 to April  
26 16, 2001), and thereafter saw her twice in September of 2002. (Tr.  
27 527 n.4.)

28 To support a decision to reject the opinion of a treating

1 physician, in addition to the testimony of a non-examining medical  
2 advisor, the ALJ must have other evidence to support the decision,  
3 such as laboratory test results, contrary reports from examining  
4 physicians, and testimony from the claimant that was inconsistent with  
5 the treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
6 751-752 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1035, 1042-1043  
7 (9<sup>th</sup> Cir. 1995).

8       The ALJ appropriately weighed the medical evidence. Substantial  
9 evidence supports the ALJ's step two finding that Plaintiff failed to  
10 meet her burden of establishing that she suffered from any severe  
11 physical impairment other than asthma. At step three Plaintiff  
12 alleges her impairments meet or medically equal the requirements of a  
13 musculoskeletal disorder, but the evidence does not support the  
14 argument. The ALJ found Plaintiff did not suffer from any severe  
15 physical impairment other than asthma, within the meaning of the  
16 regulations, for a twelve-month period during the relevant time frame.  
17 The record supports this determination. See *Tackett v. Apfel*, 180  
18 F.3d 1094, 1098 (9<sup>th</sup> Cir. 1999) (holding that, if the evidence  
19 reasonably supports a social security decision, the court must uphold  
20 the decision and may not substitute its own judgment for the  
21 agency's).

#### 22 Mental impairments

23       Plaintiff alleges the ALJ erred by rejecting the opinions of her  
24 mental health treatment providers in favor of the opinions rendered by  
25 medical expert R. Thomas McKnight, Ph.D., and examining psychologist  
26 Allen Bostwick, Ph.D. (Ct. Rec. 19 at 56-64.)

27       As noted, in addition to the testimony of a non-examining medical  
28 advisor, the ALJ must have other evidence to support a decision to

1 reject the opinion of a treating physician, such as laboratory test  
2 results, testimony from the claimant that is inconsistent with the  
3 treating physician's opinion, and, as here, contrary reports from  
4 examining physicians. See *Magallanes*, 881 F.2d at 751-752; *Andrews*,  
5 53 F.3d 1042-1043.

6 The ALJ partially credited the opinion of examining psychologist  
7 Mark Mays, Ph.D. (that Plaintiff suffers from a personality disorder)  
8 because the diagnosis is consistent with other evidence, as are his  
9 limited test results. (Tr. 528-529.) ALJ Reed gave less weight to  
10 the opinion of Averly Nelson, M.D., because Dr. Nelson saw Plaintiff  
11 "on a few occasions," noted she was tearful (due to her child's  
12 medical problems), and Dr. Nelson did not specifically evaluate  
13 cognitive functioning. (Tr. 528, 530, referring to Tr. 234-237.) The  
14 length of treatment (3 occasions over a 3-month period) and the lack  
15 of objective testing are both specific and legitimate reasons to  
16 discount Dr. Nelson's opinion.

17 The ALJ rejected the severe limitations assessed by counselors  
18 Majil Fausel, M.A., Lynne Guhlke, LMHC,<sup>2</sup> and Robert Rich, Ph.D.,  
19 clinical social worker, because: (1) severe cognitive deficits  
20 assessed by counselor Guhlke were inconsistent with the results of  
21 objective testing administered by examining psychologist Allen  
22 Bostwick, Ph.D., and with counselor Guhlke's assessed GAF of 65;<sup>3</sup> (2)

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24 <sup>2</sup> Lynne Guhlke, M.Ed., initially saw Plaintiff over a six-week  
25 period for a twelve-hour "parenting psycho-education" course related  
26 to pending dependency proceedings. (Tr. 213.)

27 <sup>3</sup> A Global Assessment of Functioning (GAF) score of 61-70  
28 indicates some mild symptoms, e.g., depressed mood and mild insomnia)

1 counselor Fausel's opinion was internally inconsistent, she gave no  
2 basis for the limits assessed, and the limitations are inconsistent  
3 with cognitive testing;<sup>4</sup> and (3) clinical social worker Rich's opinion  
4 (i.e., an assessment on September 15, 2002, of marked mental  
5 impairments in seven areas (Tr. 415-416)), is rejected for the same  
6 reasons as counselor Fausel's. (Tr. 528-532.) ALJ Reed noted that  
7 Dr. Bostwick performed the most detailed cognitive testing, which  
8 revealed average intelligence, and no severe impairments in memory or  
9 other cognitive function as Plaintiff has alleged. The ALJ points out  
10 that Dr. McKnight reviewed the entire record and offered a  
11 longitudinal opinion:

12 [He] was able to review the claimant's entire medical record  
13 in forming his opinion. Dr. McKnight noted that the records  
14 indicate that the claimant has a personality disorder with  
some associated depression and anxiety. He testified

15 or some difficulty in social, occupational, or school functioning  
16 (e.g., occasional truancy, or theft within the household), but  
17 generally functioning pretty well, has some meaningful interpersonal  
18 relationships. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4<sup>th</sup> Ed.,  
19 (DSM-IV), at 32.

20 <sup>4</sup>On September 12, 2002, Counselor Fausel assessed an extreme  
21 limitation in the ability to maintain attention and concentration for  
22 extended periods. (Tr. 417.) On March 19, 2003, she assessed four  
23 marked limitations, including in the ability to perform at a  
24 consistent pace. (Tr. 452.) On November 15, 2002 (two months after  
25 Ms. Fausel's earlier assessment), examining psychologist Dr. Bostwick  
26 opined Plaintiff showed moderately good pace and generally good  
27 persistence on all procedures he administered; cognitively, Plaintiff  
28 was "performing well." (Tr. 436, 440.)



1 that he agreed with the assessment done by Allen Bostwick,  
2 Ph.D., which is also accorded great weight, who did a  
3 thorough psychological examination and testing of the  
4 claimant. He noted that Dr. Bostwick found no evidence of  
5 problems with memory or bipolar disorder, and he gave the  
6 claimant a GAF of 55-65, which is consistent with mild  
7 symptoms. Dr. Bostwick noted that the claimant was  
8 independent in all her activities of daily living, household  
9 chores, and child care. He opined that the claimant's  
10 primary psychological condition was her personality disorder  
11 and her hypochondriacal tendencies were secondary to her  
12 personality disorder. Exhibit 26F.

13 Dr. McKnight noted that Drs. Mays and Bostwick both  
14 diagnosed a personality disorder and a depressive disorder,  
15 nos, with the personality disorder being the primary factor.  
16 He pointed out that the record did not reflect a bipolar  
17 disorder and none was diagnosed by Drs. Bostwick, Nelson, or  
18 Mays. Dr. McKnight persuasively pointed out that there was  
19 no basis for the limitations assessed by Counselor Guhlke.  
20 Exhibit 34F. The testing by Dr. Bostwick did not reveal  
21 such severe cognitive defects and there is nothing in the  
22 chart notes of Counselor Guhlke to support the limitations  
23 assessed. In addition, the global assessment of functioning  
24 was 65, which would indicate mild deficits, inconsistent  
25 with the ratings assessed in Exhibits 34F/1-2. Dr. McKnight  
26 also noted that there was no basis for the limits assessed  
27 by Counselor Fausel in Exhibits 22F and 28F.

28 (Tr. 528.)

1 The ALJ considered Plaintiff's credibility when she weighed the  
2 conflicting evidence of mental impairment. Contrary to Plaintiff's  
3 argument, the ALJ did not simply adopt Dr. McKnight's opinion and  
4 arbitrarily reject the assessments of treating sources. She discounted  
5 some mental health provider opinions based on (1) unreliable self-  
6 reporting; (2) inconsistency with Plaintiff's daily activities,  
7 including the ability to attend a college course 8 hours a day, 5 days  
8 a week, for 8-9 weeks just before onset; and (3) inconsistency with  
9 objective test results.

10 The ALJ's assessment of the mental health evidence is based on  
11 substantial evidence and without legal error.

1 **B. Remand Order**

2 Plaintiff alleges the ALJ failed to follow the remand order  
3 requiring the ALJ to give consideration to the treating, examining and  
4 consulting source opinions. (Ct. Rec. 19 at 44.) The ALJ incorporated  
5 the prior decision by reference. (Tr. 521.) Because additional  
6 evidence was presented at the most recent hearing, the ALJ correctly  
7 found that a new determination was warranted. (Tr. 532.) As noted  
8 herein, the ALJ's current assessment of the evidence is based on  
9 substantial evidence and free of legal error. Accordingly,

10 **IT IS ORDERED:**

11 1. Defendant's Motion for Summary Judgment (Ct. Rec. 25) is  
12 **GRANTED.**

13 2. Plaintiff's Motion for Summary Judgment (Ct. Rec. 18) is  
14 **DENIED.**

15 The District Court Executive is directed to file this Order and  
16 provide a copy to counsel for Plaintiff and Defendant. Judgment shall  
17 be entered for Defendant and the file shall be **CLOSED.**

18 DATED September 30, 2008.

19  
20 S/ CYNTHIA IMBROGNO  
21 UNITED STATES MAGISTRATE JUDGE  
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